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IN THE
COURT OF APPEALS OF INDIANA

DETRA M. GRAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A04-0712-CR-656
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0703-FD-483

April 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Detra Gray appeals following her conviction pursuant to a guilty plea for Theft as a Class D felony,[1] for which she received the maximum three-year sentence in the Department of Correction. Upon appeal, Gray challenges her sentence by claiming that the trial court abused its discretion in failing to consider her guilty plea as a mitigator. Gray further argues that her sentence is inappropriate in light of her character and the nature of her offense and that the theft statute, Indiana Code section 35-43-4-2 (2006), is unconstitutional. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the probable cause affidavit,[2] on October 21, 2006, an employee of the Coach Outlet Store in Edinburgh reported a suspicious female to Edinburgh Police Officer Rudy Perez. Officer Perez made contact with the female, later determined to be Gray, and found several items of clothing in her possession, including a Coach purse, for which she had no receipts. Gray admitted to Officer Perez that she had taken the Coach purse and other items from their respective stores without paying for them.

On March 6, 2007, the State charged Gray with three counts of theft, including Count I, theft of the Coach purse. On May 30, 2007, the State offered to dismiss all remaining counts in exchange for Gray's plea to Count I. On June 25, 2007, Gray pled guilty to Count I. On September 26, 2007, the trial court entered judgment of conviction on Count I and sentenced Gray to a maximum three-year sentence. In doing so, the trial

[1] Ind. Code § 35-43-4-2(a) (2006).

[2] The record does not contain the transcript of the plea hearing, so we look to the probable cause affidavit for the facts. Gray similarly refers to the probable cause affidavit in her brief.

court relied upon Gray's criminal history as an aggravating circumstance. The court found no mitigating circumstances. This appeal follows.

DISCUSSION AND DECISION

I. Guilty Plea as Mitigating Circumstance

Gray first claims that the trial court abused its discretion in failing to find her guilty plea to be a mitigating circumstance. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State* (*Anglemyer I*), 868 N.E.2d 482, 490 (Ind. 2007). In *Anglemyer I*, the Supreme Court held that Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer I*, 868 N.E.2d at 490. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. A trial court may abuse its discretion if it fails to enter a sentencing statement at all. *Id*. A trial court may also abuse its discretion if it explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. However, because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial

court cannot now be said to have abused its discretion in failing to properly weigh such factors. *Id*. at 491.

With respect to the trial court's failure to consider Gray's guilty plea, the Indiana Supreme Court has also held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Anglemyer v. State* (*Anglemyer II*), 875 N.E.2d 218, 220 (Ind. 2007). But an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Id*. at 220-21. The significance of a guilty plea as a mitigating factor varies from case to case. *Id*. at 221. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. *Id*.

Here, Gray received a substantial benefit from her plea because the State dropped two additional counts of theft against her. Furthermore, Gray admitted her guilt to Officer Perez with respect to the State's charges in all three counts. Given the strength of the State's case against her, Gray's plea may have been as much a pragmatic decision as an effort at taking responsibility. *See Wells v. State*, 836 N.E.2d 475, 479-80 (Ind. Ct. App. 2005), *trans. denied* (observing that a guilty plea does not rise to the level of significant mitigation where evidence against defendant is such that the decision to plead guilty is merely a pragmatic one). We conclude that the trial court was within its discretion in refusing to consider Gray's plea to be a significant mitigating circumstance.

II. Appropriateness of Sentence

With respect to Gray's claim that her sentence was inappropriate in light of her character and the nature of her offense, we observe that Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Gray first argues that, given the value of the purse at issue here, which she contends is relatively low for Class D felony theft,[3] the nature of her offense does not favor the maximum sentence. Regardless of the dollar value at issue, we are inclined to view the instant offense in its context, namely that it was one act in an apparent spree of admittedly illegal activity and mirrors Gray's rather remarkable criminal history in

[3] The theft of property qualifies as a Class D felony, rather than a Class C felony, if the fair market value of the property is less than $100,000. *See* Ind. Code § 35-43-4-2.

property crimes. We reject Gray's argument that the nature of her theft suggests that her sentence is inappropriate.

As to Gray's character, while she should be applauded for apparently taking responsibility for another woman's child, her extensive criminal history nevertheless diminishes her character in our view. According to the pre-sentence investigation report, Gray has quite a lengthy criminal history including eight prior felony convictions for theft, two felony convictions for intimidation, and additional convictions for larceny, criminal conversion, and disorderly conduct. Given this extensive criminal history demonstrating Gray's continuing disregard for others and their property, which is further evidenced by the conviction at issue, we are unconvinced that Gray's maximum three-year sentence for the instant offense is somehow inappropriate in light of her character and the nature of her offense.

III. Constitutionality of the Theft Statute

Gray also challenges her sentence by claiming that Indiana Code section 35-43-4-2 violates the proportionality clause in Article 1, Section 16 of the Indiana Constitution. Article 1, Section 16 provides that "All penalties shall be proportioned to the nature of the offense." Indiana courts have consistently supported the proposition that a determination of the appropriate penal sanction is primarily a legislative consideration. *See State v. Moss-Dwyer*, 686 N.E.2d 109, 111 (Ind. 1997). We will not disturb the legislative determination of the appropriate penalty for criminal behavior except upon a showing of a clear constitutional infirmity. *Id*. at 111-12. Upon considering a statute's constitutionality, we begin with the presumption that it is valid. *See id.* at 112. The party

challenging the statute has a heavy burden to show that the statute is unconstitutional. *Id*. We will not set aside a legislatively sanctioned penalty because it might seem too severe. *Teer v. State*, 738 N.E.2d 283, 290 (Ind. Ct. App. 2000), *trans. denied*. A sentence may be unconstitutional by reason of its length, if it is so severe and entirely out of proportion to the gravity of the offense committed as "'to shock public sentiment and violate the judgment of a reasonable people.'" *Id*. (quoting *Cox v. State*, 203 Ind. 544, 549, 181 N.E. 469, 472 (1932)).

Indiana Code section 35-43-4-2(a) provides that a person who exerts unauthorized control over another person's property commits theft as a Class D felony if the property value is less than $100,000. If the value of the property equals or exceeds $100,000, the offense is a Class C felony. *See* Ind. Code § 35-43-4-2(a). A Class D felony offense has a sentencing range of from six months to three years, with the advisory sentence being one and one-half years. *See* Ind. Code § 35-50-2-7 (2006). A Class C felony offense has a sentencing range of from two to eight years with the advisory sentence being four years. *See* Ind. Code § 35-50-2-6 (2006).

As demonstrated, Indiana Code § 35-43-4-2 provides for a wide range of sentences for the offense of theft, from as little as six months to as much as eight years, depending upon the value of the property stolen and various other sentencing factors. Although as Gray argues, she could have stolen items of much greater value and been subject to the same sentence, the fact that differing crimes may result in the same sentence does not satisfy her high burden of demonstrating the statute is unconstitutionally disproportionate

or severe. We reject Gray's contention that the average citizen would be shocked to hear that an individual who steals a purse, whatever its value, after having committed eight prior felony thefts and various other crimes, including intimidation, would receive a maximum three-year sentence for that offense. Indeed, we venture to guess that the average citizen might be more inclined to express shock if such an offender received any lesser term of years. In any event, we conclude that Gray has failed to establish that Indiana Code section 35-43-4-2 violates the proportionality clause of the Indiana Constitution.

Having determined that the trial court did not abuse its discretion in failing to consider Gray's guilty plea as a mitigator, that her maximum three-year sentence was not inappropriate in light of her character and the nature of her offense, and having rejected Gray's constitutional challenge to Indiana Code section 35-43-4-2, we affirm the trial court's imposition of the maximum three-year sentence in the instant case.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.